92-1295

NO.

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In The Supreme Court of the United States

October Term, 1992

KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL STATE OF MISSISSIPPI; DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI; MISSISSIPPI STATE BOARD OF ELECTION COMMISSIONERS; THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; AND WALTER A. GRAHAM, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE MISSISSIPPI SENATE.

APPELLANTS

VERSUS

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, AND JOHN QUINCY ADAMS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE AND THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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80 pp

QUESTIONS PRESENTED

I. Whether a jurisdiction covered by Section 5 of the Voting Rights Act, which enacts reapportionment legislation to satisfy the subjective concerns of the Attorney General of the United States under Sections 5 and 2 of that Act, should be assessed attorney's fees and costs in a parallel judicial proceeding under Sections 5 and 2 when the court concludes that the private litigants obtained no relief from the court.

II. Whether the district court's order, which "compensates" Appellees' attorneys for 1879 hours, is reasonable considering the minimal results achieved by their efforts, and whether such decision is in conflict with this court's decisions in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Hollis Watkins, Alice Harden, Aaron Henry, Edward Blackmon, Jr., Samuel McCray, Jacqueline Harper, Ben F. Burkett, Mac Arthur Cotton, and John Quincy Adams, on behalf of themselves and all others similarly situated.

Defendants: Kirk Fordice, Governor of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, members of the State Board of Election Commissioners, Mississippi Democratic Party Executive Committee and Republican Party Executive Committee.

Defendants-Intervenors: The Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature; Tim Ford, in his official capacity as Speaker of the Mississippi House of Representatives; and Ollie Mohamed, in his official capacity as President Pro Tempore of the Mississippi Senate.

The Defendants, except for the political party executive committees which did not participate in the proceedings on the attorney's fees motions, and the Defendant-Intervenors are the Appellants in this Court. The Plaintiffs and the defendant political party executive committees are the Appellees in this Court.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 5

42 U.S.C. § 19731(e)
42 U.S.C. § 1988

STATEMENT OF THE CASE 5

THE QUESTIONS PRESENTED ARE SUBSTANTIAL 14

I. Whether a jurisdiction covered by Section 5 of the Voting Rights Act, which enacts reapportionment legislation to satisfy the subjective concerns of the Attorney General of the United States under Sections 5 and 2 of that Act, should be assessed attorney's fees and costs in a parallel judicial proceeding under Sections 5 and 2 when the court concludes that the private litigants obtained no relief from the court. 14

II. Whether the district court's order, which "compensates" Appellees' attorneys for 1879 hours, is reasonable considering the minimal results achieved by their efforts, and whether such decision is in conflict

with this court's decisions in *Farrar v. Hobby*, _____ U.S. _____, 113 S. Ct. 566 (1992), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 20

CONCLUSION 22

APPENDIX

Appendix A
Memorandum Opinion and Order A1

Appendix B
Notice of Appeal A44

Appendix C
Order Withdrawing State Defendants' Motion To Establish Schedule To Enforce Court Opinion And Order Of August 9, 1991 ..... A48

TABLE OF AUTHORITIES

CASES	PAGE
Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board, 919 F.2d 374 (5th Cir. 1990)	15
Beer v. United States, 425 U.S. 130 (1976)	18
Farrar v. Hobby, ____ U.S. ____, 113 S. Ct. 566 (1992)	16, 17, 20, 21
Hensley v. Eckerhart, 461 U.S. 424 (1983)	20, 21
Mitchell v. Donovan, 398 U.S. 427 (1970)	3
Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)	3
Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989)	14, 16
Turner v. City of Memphis, 369 U.S. 350 (1962)	5
Watkins v. Fordice, 791 F. Supp. 646 (S.D. Miss. 1992)(three-judge court)	*passim*

Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss.)(three-judge court), aff'd mem. and vacated in part as moot, ___ U.S. ___, 112 S. Ct. 412 (1991) ..... *passim*

Watkins v. Mabus, ___ U.S. ___, 112 S. Ct. 17 (1991) 9

Watkins v. Mabus, ___ U.S. ___, 112 S. Ct. 421 (1991) 10

Weiser v. White, 505 F.2d 912 (5th Cir.), *cert. denied*, 421 U.S. 993 (1975) 4

STATUTES

28 U.S.C. § 1253 3

28 U.S.C. §§ 1254(1) and 2101(e) 4

42 U.S.C. § 19731(e) 2, 5

42 U.S.C. § 1973 ..... *passim*

42 U.S.C. § 1988 ..... 2, 5

MISS. CODE ANN. § 23-15-191 (revised 1990) 6

OTHER

28 C.F.R. § 51.55(2) (1992) 19

ART. 13, § 254, MISS. CONST. 1890 15

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KIRK FORDICE, GOVERNOR
OF MISSISSIPPI, ET AL.
Appellants

v.

HOLLIS WATKINS, ET AL.
Appellees

JURISDICTIONAL STATEMENT

Appellants Governor Kirk Fordice of Mississippi, together with the other two members of the Mississippi State Board of Election Commissioners, and the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature, together with the Speaker of the Mississippi House of Representatives and the President Pro Tempore of the Mississippi Senate, respectfully submit that this Jurisdictional Statement presents substantial questions re-

quiring plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINIONS BELOW

The memorandum opinion and order of the three-judge district court on attorney's fees (J.S. App. 1) is unreported as of this date. The district court's two prior opinions on the merits are officially reported at ***Watkins v. Mabus***, 771 F. Supp. 789 (S.D. Miss.) (three-judge court), *aff'd mem. and vacated in part as moot*, _____ U.S. _____, 112 S. Ct. 412 (1991), and ***Watkins v. Fordice***, 791 F. Supp. 646 (S.D. Miss. 1992) (three-judge court).

JURISDICTION

The three-judge district court entered its memorandum opinion and order awarding fees under the fee shifting provisions of the Voting Rights Act, 42 U.S.C. § 1973*l*(e) and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, on October 29, 1992 (J.S. App. 1). Appellants filed their notice of appeal to this Court on November 30, 1992 (J.S. App. 44). On December 1, 1992, Appellants filed a separate notice of appeal to the United States Court of Appeals for the Fifth Circuit. On November 25, 1992, the

Appellees herein, Hollis Watkins, et al., filed a notice of appeal simultaneously to this Court and to the United States Court of Appeals for the Fifth Circuit. On January 4, 1993, the Appellees herein moved the Fifth Circuit to stay that appeal pending resolution of their appeal to this Court. On January 19, 1993, the Fifth Circuit stayed the appeal to that court until March 19, 1993, *Watkins v. Fordice*, 5th Cir. No. 92-7764. On January 20, 1993, Appellees filed their own separate jurisdictional statement in this Court. *Watkins v. Fordice*, No. 92-_____.

Appellants invoke this Court's appellate jurisdiction under 28 U.S.C. § 1253. While the Court has held that a three-judge court order which does not grant or deny an injunction is not appealable under § 1253, *Mitchell v. Donovan*, 398 U.S. 427, 430-32 (1970), and has more recently stated that it "would not have appellate jurisdiction under 28 U.S.C. § 1253 to decide the attorney's fees question had it alone been appealed," *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980), the Fifth Circuit has held that jurisdiction to review appeals from three-judge court orders denying attorney's fees lies only in the Supreme

Court. ***Weiser v. White***, 505 F.2d 912, 913 & 918 (5th Cir.), *cert. denied*, 421 U.S. 993 (1975). While Appellants have questions regarding this Court's jurisdiction under 28 U.S.C. § 1253 to review an order awarding attorney's fees, Appellants are filing this Jurisdictional Statement to raise on appeal the questions presented herein should the Court note probable jurisdiction of Appellees' appeal.

Appellants also invoke this Court's jurisdiction under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which states in pertinent part: "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28 and *any appeal shall lie to the Supreme Court*." (Emphasis added)

If the Court determines that it lacks jurisdiction over the appeal, then Appellants alternatively request that the Court treat this Jurisdictional Statement as a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and that the Court grant certiorari to review the district court's order before judgment in the court of appeals as authorized by 28 U.S.C. §§ 1254(1) & 2101(e). *See*

Turner v. City of Memphis, 369 U.S. 350, 353-54 (1962).

STATUTES INVOLVED

42 U.S.C. § 19731(e) provides:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 provides, inter alia:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On October 29, 1992, the United States District Court for the Southern District of Mississippi, sitting as a three-judge court to resolve a challenge to Mississippi's legislative reapportionment based on the 1990 census, entered an attorney's fee order awarding the Watkins Appellees[1] $198,688.23

[1] Appellees Mississippi Democratic Party Executive Committee and Mississippi Republican Party Executive Committee, which were defendants in the action below, did not participate in the proceedings on the attorney fee motion.

against the State of Mississippi in attorney's fees and costs. This award was made notwithstanding the district court's conclusion that the Appellees obtained no relief from the Court and that the lawsuit had not prompted the Mississippi Legislature to enact reapportionment legislation since such was required by Mississippi law (J.S. App. 9 - 10).

This lawsuit was filed on June 28, 1991. Two years prior to the commencement of this action, the Mississippi Legislature initiated its reapportionment activity by postponing the regular August, 1991 primary elections to September and October, 1991. This legislative action was taken in anticipation of legislative and county elections being conducted in the same year as the release of the 1990 census results. A postponement of the regular August primary dates was deemed necessary to enable both the legislature and the counties to redistrict in 1991, obtain federal preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and to hold elections that year. On June 28, 1989 the Attorney General of the United States precleared under Section 5 the change in the election schedule. MISS. CODE ANN. § 23-15-191 (Revised 1990).

The State of Mississippi received the 1990 decennial census data on January 31, 1991. After a series of public hearings throughout the State of Mississippi, the Mississippi Legislature on April 30, 1991 adopted reapportionment plans for the House and Senate. On May 10, 1991 the United States Attorney General received for review under Section 5 of the Voting Rights Act the 1991 legislative reapportionment plans, and on July 2, 1991 he interposed an objection. ***Watkins v. Mabus***, 771 F. Supp. 789, 792 (S.D. Miss. 1991).

On June 28, 1991, between the date of the submission of the plans to the Attorney General of the United States and the date of his objection, the Appellees filed this action in the district court challenging Mississippi's then current legislative apportionment (1982 plan), as well as the 1991 plan. Appellees sought injunctive and other relief under Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 & 1973c, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 771 F. Supp. at 791-792.

After a hearing on July 15, 1991, the district court, by order of that date and without opposition from the appellant members of the State Board of Election Commissioners,

enjoined the July 19, 1991 legislative qualifying deadline. The district court also requested recommendations for special master or court experts and directed the parties to file their proposed plans on or before July 22, 1991. A hearing was set for July 29, 1991. *Id.* at 793.

A hearing was held between July 29, 1991 and August 1, 1991, after which the court concluded that none of the submitted plans could be used for the 1991 legislative elections. *Id.* at 794-97, 800. The court also found that insufficient time remained to enable it to fashion a plan of its own and, therefore, by order dated August 2, 1991, ordered that interim 1991 legislative elections be held under the 1982 plan. *id.* at 797, 799. Appellees requested the district court to stay the 1991 legislative elections, and this request was denied by order dated August 8, 1991. *Id.* at 791.

On August 9, 1991, Appellees applied to this Court for an injunction and stay pending appeal. Appellees had filed their notice of appeal on August 6, 1991. On August 12, 1991 Appellees filed a supplement to their application for injunction and stay pending appeal. On August 20, 1991, this Court, on the referral of the application by Justice Scalia,

denied the application for stay. ***Watkins v. Mabus***, ___ U.S. ___, 112 S. Ct. 17 (1991).

On August 26, 1991, Appellees moved the district court for a preliminary injunction under Section 5 of the Voting Rights Act to enjoin its enforcement of its August 2, 1991 order scheduling the 1991 legislative elections, contending that the order contained new procedures for the elections which had not been precleared under Section 5. On August 30, 1991, the district court denied Appellees' request for a preliminary injunction, concluding that new temporary election procedures for the conduct of the 1991 legislative elections were necessary court ordered changes which did not reflect policy choices of elected representatives. On September 9, 1991, Appellees filed an amended notice of appeal to this Court. On September 13, 1991, Appellees filed a jurisdictional statement with this Court in ***Watkins v. Mabus***, No. 91-434, and on September 14, 1991 applied to this Court for another injunction and stay pending appeal. On September 16, 1991, Justice Scalia denied Appellees' application for injunction and stay pending appeal.

On October 14, 1991, the Appellants filed a motion to

dismiss or affirm with this Court in *Watkins v. Mabus*, No. 91-434, and on November 12, 1991, this Court summarily affirmed the orders of the district court, with the exception of vacating the order in part as to election procedures since Appellees' claims were rendered moot by the completion of the September 17, 1991 election. *Watkins v. Mabus*, ___ U.S. ___, 112 S. Ct. 421 (1991).

The Mississippi Legislature, during the 1992 Regular Session, adopted new plans for the House and Senate (J.R. 1, 202, Mississippi Legislature 1992 Regular Session), incorporating changes in response to the July 2, 1991 objection letter of the Attorney General of the United States. The 1992 reapportionment plans were submitted to the Attorney General of the United States and were precleared by letter dated March 30, 1992, except for three (3) Senate districts. In response to the objection of the Attorney General to the three Senate districts, a new Senate plan was adopted, J.R. 204, which the Attorney General of the United States precleared under Section 5 on May 8, 1992. *Watkins v. Fordice*, 791 F. Supp. 646, 647 (S.D. Miss. 1992) (three-judge court).

On April 28, 1992, ten (10) days before the final preclearance date, the appellant members of the State Board

of Election Commissioners had moved the district court to order immediate and permanent legislative elections for all those districts in Joint Resolutions 1 and 202 that were precleared and to draw temporary districts for Senate Districts 37, 38 and 39, and to order temporary elections in Senate Districts 37, 38 and 39. On that same date the Appellees moved for preliminary and permanent injunctions and for injunctive and declaratory relief setting aside the results and certification of the 1991 election and scheduling legislative elections for late 1992. On May 21, 1992, the district court *sua sponte* entered an opinion and order scheduling special legislative primary elections to be held on August 4, 1992, with any runoff elections to be held on August 25, 1992. 791 F. Supp. at 649. The court scheduled the general election for November 3, 1992 to coincide with the national presidential and congressional election. *Id.* The district court concluded that the preclearance of both plans (House and Senate) mooted most of the pending motions. *Id.* at 648. The court directed the movants to notify the court as to those motions they desired to be considered and to withdraw the remainder motions. *Id.* at 649. On May 22,

1992, the appellant members of the Mississippi State Board of Election Commissioners promptly withdrew their motion of April 28, 1992 requesting the court to schedule legislative elections, since the court's sua sponte order of May 21, 1991 mooted Appellants' motion (J. S. App. 48). Appellees to this date have not complied with the district court's direction, as found by the district court in its order awarding attorney's fees (J.S. App. 4 - 5).

Appellees moved the three-judge district court to dissolve and to remand the case to the managing district judge for an award of attorney's fees and expenses, after discovery and an evidentiary hearing on the attorney's fees issues. Appellees requested fees in the amount of $805,659.10 for 2728.8 hours of work claimed by their seven attorneys and reimbursement for expenses claimed in the amount of $61,279.29. Appellees sought a premium hourly rate for the work performed in this case, or alternatively, an enhancement of the lodestar. Appellants filed a joint response opposing the motions. Appellants argued that the three-judge district court should not be dissolved since elections scheduled by the three-judge court were still being conducted

and because Appellees had not yet complied with the district court's order concerning identification of motions which were to be considered or which would be withdrawn. Appellants also challenged Appellees' status as prevailing parties in the litigation and challenged the reasonableness of the time, hourly rates and expenses claimed by Appellees. Appellees filed a lengthy reply in support of their motions.

Through its memorandum opinion and order entered on October 29, 1992 (J.S. App. 6), the three-judge district court denied Appellees' motion to remand to the managing judge and the requests to engage in discovery and to have an evidentiary hearing on the attorney's fees. The three-judge court awarded Appellees $198,688.23 in attorney's fees and expenses.

Appellees filed a timely notice of appeal on November 25, 1992, simultaneously appealing to this Court, as well as the United States Court of Appeals for the Fifth Circuit. By separate notices filed on November 30 and December 1, 1992, Appellants filed separate simultaneous appeals from the order to both this Court as well as the Fifth Circuit.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

WHETHER A JURISDICTION COVERED BY SECTION 5 OF THE VOTING RIGHTS ACT, WHICH ENACTS REAPPORTIONMENT LEGISLATION TO SATISFY THE SUBJECTIVE CONCERNS OF THE ATTORNEY GENERAL OF THE UNITED STATES UNDER SECTIONS 5 AND 2 OF THAT ACT, SHOULD BE ASSESSED ATTORNEY'S FEES AND COSTS IN A PARALLEL JUDICIAL PROCEEDING UNDER SECTIONS 5 AND 2 WHEN THE COURT CONCLUDES THAT THE PRIVATE LITIGANTS OBTAINED NO RELIEF FROM THE COURT.

In *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989), this Court held that a prevailing party within the meaning of 42 U.S.C. § 1988 "must be one who has succeeded on any significant claim affording it some relief sought, either pendente lite or at the conclusion of the litigation." *Id.* at 791. Stated somewhat differently, this Court required that "at a minimum to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the relationship between itself and the defendant." *Id.* at 792. The United States Court of Appeals for the Fifth

Circuit has followed the "catalyst theory" in determining whether a party is the prevailing party in cases where the dispute is resolved pendente lite. In *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 378 (5th Cir. 1990), the Fifth Circuit held that under the catalyst theory of entitlement the plaintiffs must establish two elements: (1) that the goal of the lawsuit was achieved and (2) that the suit itself caused the defendants to remedy the discrimination. In this case the causation of the final 1992 reapportionment plans, as clearly reflected by the record of this case, was the objection letters of the Attorney General of the United States to the 1991 reapportionment legislation and to the three Senate districts in the 1992 legislation, not the filing of the lawsuit by plaintiffs.

The district court in awarding the attorney's fees recognized that the prevailing party issue in this case was a close question (J.S. App. 12). The district court concluded that the plaintiffs obtained no relief from the court, and it rejected Appellees' argument that the lawsuit prompted the Mississippi Legislature to adopt reapportionment legislation when it did, since the Legislature was required to do so by state constitutional provision, ART. 13, § 254, MISS. CONST.

1890 (J.S. App. 9 - 10). The district court also concluded that the Mississippi Legislature did not create the maximum number of black legislative seats in response to Appellees' claims asserted in the lawsuit (J.S. App. 10 - 11). The Court specifically held:

> Moreover, this court rejected plaintiffs' contention that the law required apportionment which resulted in the creation of the maximum number of electable black majority districts. *Watkins v. Mabus*, 771 F. Supp. 789, 806 (S.D. Miss. 1991). (Footnote omitted) Yet in spite of the court's opinion in that regard, the legislature passed apportionment plans which satisfied plaintiffs' objectives. It could certainly be reasonably contended that the legislature's action was, in fact, a "gratuitous response" to plaintiffs' lawsuit, since the court had given no indication that plaintiffs would secure such wholesale relief in this judicial forum, and in fact, had forecast little chance of plaintiffs' securing a court-ordered plan which satisfied their agenda. (Footnote omitted) (J.S. App. 10 - 11)

Notwithstanding the above conclusions by the district court, it found that Appellees were the prevailing parties for the sole reason that the lawsuit was a motivating factor in the Legislature's adoption of the particular plans enacted (J.S. App. 12). The district court's decision on the prevailing party issue is contrary to this Court's decision in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989), and *Farrar v. Hobby*, ___ U.S. ___, 113 S. Ct. 566 (1992).

These cases teach that there must be some material change in the legal relationship between the parties before a plaintiff can be considered a "prevailing party." In *Farrar v. Hobby* this Court held that:

> No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against the defendant.

113 S. Ct. at 574.

The fact that the Mississippi Legislature enacted reapportionment legislation in 1992 that satisfied the concerns of the Attorney General of the United States, which was precleared under Section 5, did not change the legal relationship between the plaintiffs and defendants. Such action on the part of the Mississippi Legislature may have mooted plaintiffs' claims, but it did not change their legal relationship within the meaning of *Farrar v. Hobby*.

The prevailing party issue in Voting Rights Act cases in jurisdictions covered by Section 5 of the Voting Rights Act is clouded by the fact that covered jurisdictions, when enacting reapportionment plans, are confronted with satisfying the subjective concerns of the Attorney General of the United States while at the same time defending a Section 5 and 2

Voting Rights suit in the local federal district court. The issue is further obscured by the fact that the Attorney General of the United States will require covered jurisdictions to create districts with black majority voting age populations of 65% in certain areas while requiring higher or lower percentages in other areas (nonpacking vs. nondilution). Additionally, the Attorney General of the United States, in making Section 5 preclearance decisions, has added an additional substantive standard to the objective standard adopted by this Court in ***Beer v. United States***, 425 U.S. 130 (1976). In ***Beer*** this Court adopted the nonretrogression preclearance standard. *Id.* at 141. ("[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."). Under this standard jurisdictions covered by Section 5 of the Voting Rights Act with a substantial degree of predictability could satisfy this objective standard by enacting reapportionment plans that enhanced minority voting strength. In 1987 the United States Department of Justice amended its procedures for the administration of Section 5 by adding a subjec-

tive standard for determining whether election changes, including reapportionment and redistricting plans covered by Section 5, should receive federal preclearance under that Act. Under 28 C.F.R. § 51.55(2) (1992), the Attorney General of the United States can now interpose (as he did in this case, 771 F. Supp. at 792) an objection under Section 5 to reapportionment and redistricting plans even if they enhance minority voting strength and are thus nonretrogressive, if he is of the subjective view that such plans constitute a clear violation of the nonobjective standards of Section 2 of the Voting Rights Act.

Under the new, subjective and unpredictable standards used by the Attorney General of the United States to determine if reapportionment plans should be precleared, covered jurisdictions can only speculate whether their plans will pass Section 5 muster. If they fail to satisfy the Attorney General, they are sued by private litigants. If they enact legislation to satisfy the Attorney General's concerns, the private litigants demand attorney's fees. In the instant case, the district court's decision failed to recognize that the legislature's enactment of the 1992 reapportionment plan was in

direct response to the Attorney General of the United States' specific concerns. Accordingly, the district court clearly erred in concluding that Appellees were the prevailing parties.

II.

WHETHER THE DISTRICT COURT'S ORDER, WHICH "COMPENSATES" APPELLEES' ATTORNEYS FOR 1879 HOURS, IS REASONABLE CONSIDERING THE MINIMAL RESULTS ACHIEVED BY THEIR EFFORTS, AND WHETHER SUCH DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *FARRAR V. HOBBY*, ___ U.S. ___, 113 S. CT. 566 (1992), AND *HENSLEY V. ECKERHART*, 461 U.S. 424 (1983).

This case was filed on June 28, 1991 and was effectively concluded on May 21, 1992, when the district court sua sponte scheduled legislative elections for August and November, 1992. The only injunction won by the Appellees in this case was the enjoining of the legislative candidate qualifying deadline of July 19, 1991, and this injunction was not opposed by the appellant members of the State Board of Election Commissioners or by the other parties. All of Appellees' motions in 1991 to obtain preliminary or permanent injunctive relief in 1991 were denied. ***Watkins v. Mabus***, 771 F. Supp. at 797. Appellees obtained no injunctive relief

in 1992. The appellant members of the State Board of Election Commissioners sought legislative elections in 1992 (J.S. App. 48). Accordingly, Appellees cannot point to this conclusion as a successful result achieved by them.

Notwithstanding the minimal nature of Appellees' success, the district court compensated Appellees for almost 2000 hours expended in 1991 and 1992 on this case. This award is contrary to this Court's decisions in ***Farrar v. Hobby***, 113 S. Ct. 566 (1992); ***Hensley v. Eckerhart***, 461 U.S. 424, 439 (1983). Both ***Farrar*** and ***Hensley*** stress that the extent of a plaintiff's success is a crucial factor in determining a proper fee award. ***Farrar***, 113 S. Ct. at 574; ***Hensley***, 461 U.S. at 440. Given the significantly limited nature of the Appellees' success in this case, a significantly reduced fee award should have been made. The district court's award does not satisfy this standard. The question presented is substantial because the district court's decision will likely serve as a precedent to other three-judge district courts confronted with attorney's fee claims in legislative reapportionment cases.

CONCLUSION

For these reasons, probable jurisdiction should be noted or certiorari should be granted.

Respectfully submitted,
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Jackson, Mississippi
January 29, 1993

APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.
Individually and on behalf of
A11 Others Similarly Situated,

PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0364(L)

KIRK FORDICE, Governor of Mississippi, ET AL.

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE; TIM FORD,
In His Official Capacity As Speaker of the Mississippi
House of Representatives; and OLLIE MOHAMED,
In His Official Capacity As President Pro Tempore
of The Mississippi Senate

DEFENDANTS-INTERVENORS

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
OCT 29 1992
J. T. NOBLIN, CLERK
BY _____ DEPUTY

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of plaintiffs todissolve the three-judge court previously convened in this Voting Rights Act case at the request of plaintiffs, and to remand case to managing district judge for an award of attorneys, fees and expenses.

Plaintiffs have also moved for an award of attorneys' fees and litigation expenses and by their motion, they further seek discovery and an evidentiary hearing on issues relating to the prevailing market rates for attorney services, the necessity of enhancement in civil rights cases and the market difference between contingency and non-contingency fee cases. The State defendants[1] and the Joint Committee

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[1] The State defendants include Kirk Fordice, Governor of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, in their respective official capacities and as members of the State Board of Election Commissioners.

defendants-intervenors[2] have responded in opposition to plaintiffs, motion to dissolve the three-judge court and have separately responded, opposing plaintiffs' motion for an award of attorneys, fees and expenses. The first matter which the court must address is the question whether it is proper at this juncture to dissolve the three-judge court[3] Plaintiffs seek the dissolution of the three-judge court and a remand of the case to the managing district judge for resolution of the pending attorneys' fees motion contending that as the statutory function of the three-judge court has been fulfilled, there remains no reason nor justification for the three-judge court's remaining convened. Defendants, on the other hand, maintain that the three-judge court should remain convened, for

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[2] The Joint Committee defendants are the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature; Tim Ford in his official capacity as Speaker of the Mississippi House of Representatives; and Ollie Mohamed in his official capacity as President Pro Tempore of the Mississippi Senate.

[3] The facts and procedural history of this case are fully set forth in the court's prior opinions and orders, *see* ***Watkins v. Mabus***, 771 F. Supp. 789 (S.D. Miss.), *aff'd mem. in part and vacated in part as moot.* U.S. __, 112 S. Ct. 412, 116 L.Ed.2d 433 (1991), and ***Watkins v. Fordice***, 791 F. Supp. 646 (S.D. Miss. 1992), and need not be repeated here.

the reason that there remain motions pending in this cause for resolution by the three-judge court and for the further reason that it may become necessary at some time prior to the scheduled November 3, 1992 elections for the three-judge court to modify, clarify or interpret the court's May 21, 1992 opinion and order. While the court is of the opinion that the three-judge court need not remain convened during the pendency of the elections due to a concededly remote possibility that there might arise a need for a modification of the court's order, the court is nevertheless of the view that it would be inappropriate to dissolve the three-judge court until such time as there has been a final resolution or disposition of each of the motions that has been filed in this action.

By order dated May 21, 1992, the court ordered "[t]hat because the preclearance of both [House and Senate] plans moots most of the pending motions, the movants are promptly to notify the court as to those motions they desire to be considered and to withdraw the remaining motions." At

the time of the court's order in that regard, there were a number of motions by plaintiffs pending, including, *inter alia,* a motion for class certification, a motion to withdraw their motion for class certification, a motion for leave to file a supplemental or second amendment to their complaint, and a "motion for preliminary and permanent injunctions and for injunctive and declaratory relief setting aside results and certifications of 1991 and March 1992 legislative elections and scheduling legislative elections for late 1992." Though plaintiffs failed to comply with the court's order requiring "prompt" notification of the plaintiffs' position regarding their motions, plaintiffs now advise in their rebuttal brief that their motions have either been withdrawn and/or are moot and thus do not need to be withdrawn. To reiterate, the court ordered that the parties "notify the court as to those motions they desire to be considered and to withdraw the remaining motions." Plaintiffs have not complied with the court's order and, in order to avoid any future confusion, the three-judge

court will remain convened until such time as plaintiffs have formally complied with the court's order. Therefore, plaintiffs' motion to dissolve the three-judge court will at this time be denied.

While a single judge has the authority to rule on plaintiffs' motion for an award of attorneys' fees and expenses, since this three-judge court remains convened, it may properly address and resolve that motion. *See Connor v. Winter*, 519 F. Supp. 1337 (S.D. Miss. 1981). Turning now to that motion, the court, based on the memoranda and information provided, makes the following findings and conclusions.

Plaintiffs' present motion asserts that as prevailing parties in this litigation, they are entitled to recover their attorneys' fees and expenses from defendants. Defendants oppose plaintiffs' motion for attorneys' fees and expenses contending that plaintiffs are not prevailing parties within the meaning of the applicable attorneys' fee statutes. They assert

alternatively that if the court should conclude that plaintiffs are indeed prevailing paryies, then the court should award an amount substantially less than that requested by plaintiffs since the hours claimed by plaintiffs' attorneys are unreasonable and excessive, their hourly rates are unreasonably high, and their expenses are not properly compensable and/or are unreasonable and excessive.

PREVAILING PARTIES

Plaintiffs' entitlement to an award of attorneys' fees is determined by reference to 42 U.S.C. § 1988 and 42 U.S.C. § 1971(e), which provide for an award of reasonable attorneys' fees to prevailing plaintiffs in civil rights litigation and Voting Rights Act lawsuits.[4] In *Texas State Teachers Association v.*

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[4] Section 1988 provides, as is pertinent here:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 19731(e) similarly provides:

> In any action or proceeding to enforce the

Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989), the Supreme Court attempted to clarify the proper standard to be used in determining whether a party has "prevailed" such that the party is eligible for an award of attorneys' fees. A prevailing party, the Court stated, "must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation," 489 U.S. at 791, 109 S. Ct. at 1492, so that "there is a resolution of the dispute which changes the legal relationship between [plaintiffs] and defendant[s]," *id.* at 1493. As is pertinent to the case at bar, the Fifth Circuit has explained:

> [I]n the absence of a judgment, a party may be entitled to fees as a prevailing party "if its ends are accomplished as a result of the litigation." *Williams v. Leatherbury*, 672 F.2d 549, 550 (5th Cir. 1982). Thus, a plaintiff must establish two elements: (1) that the goal of the law suit was achieved, and (2) that the suit itself caused the

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voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

> defendant to remedy the discrimination. *Savidge [v. Fincannon)*, 836 F.2d [898,] 904-05 [(5th Cir. 1982).
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> A plaintiff who successfully shows both these elements has made a prima facie case that it is a prevailing party entitled to attorney's fees. The burden of proof then shifts to the defendant, who can challenge the entitlement only by showing that its conduct was a "wholly gratuitous response to a lawsuit that lacked colorable merit." *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (5th Cir. 1985).

Associated Builders & Contractors, Inc. v. Orleans Parish School, 919 F.2d 374, 378 (5th Cir. 1990).

In this case, there is little question but that the plaintiffs' goal was achieved, as the Mississippi Legislature ultimately passed a redistricting plan which met the criteria demanded by plaintiffs, most significantly the creation of the maximum possible number of majority black legislative districts. It is the second of the elements described by the Fifth Circuit, though, which gives the court pause. The court is not persuaded that plaintiffs' lawsuit prompted the Mississippi Legislature's having devised and passed a redistricting plan in its 1992 regular session, as that eventuality was inevitable

under Mississippi law.[5] Additionally, it is noteworthy that plaintiffs were not successful in securing relief from this court. Plaintiffs came before the court seeking, primarily, an order enjoining the 1991 legislative elections.[6] Not only was their request for that injunctive relief denied, but the court ordered, over plaintiffs' strenuous objection, that interim elections proceed under the 1982 legislative apportionment plan. This court denied a motion by plaintiffs for a stay, and on appeal by plaintiffs, the United States Supreme Court similarly denied their stay request and summarily affirmed this court's ruling that elections be held under the 1982 plan. Moreover, this court rejected plaintiffs' contention that the

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[5] Article 13, Section 254 of the Mississippi Constitution mandates legislative redistricting during the regular legislative session in the second year following the decennial census, failing which the governor must reconvene the legislature in a special apportionment session during which it would be "the mandatory duty of the legislature to adopt a joint resolution of apportionment." Should that effort fail, an apportionment commission would be convened, whose sole function would be to apportion the state into legislative districts.

[6] Plaintiffs' suit included allegations that the 1982 apportionment schemes for the Mississippi House of Representatives and Mississippi Senate were unconstitutionally malapportioned and that the 1991 House and Senate apportionment plans could not be implemented as they had not been administratively or judicially precleared. However,

law required apportionment which resulted in the creation of the maximum number of electable black majority districts. *Watkins v. Mabus,* 771 F. Supp. 789, 806 (S.D. Miss. 1991).[7] Yet in spite of the court's opinion in that regard, the legislature passed apportionment plans which satisfied plaintiffs' objectives. It could certainly be reasonably contended that the legislature's action was, in fact, a "gratuitous response" to plaintiffs' lawsuit, since the court had given no indication that plaintiffs would secure such wholesale relief in this judicial forum, and in fact, had forecast little chance of plaintiffs' securing a court-ordered plan which satisfied their agenda.[8]

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those were hardly matters of contention between the parties. These facts were conceded by defendants from the outset, so it can not realistically be said that plaintiffs "won" these points.

[7] The court stated: "It is doubtful whether *Gingles* held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible." *Watkins,* 771 F. Supp. at 806. The court further observed that "[w]hile the creation of 40 black majority districts may be an acceptable legislative goal, even it it means creating a significant number of non-compact districts, it is not a goal that this court must, or necessarily should, implement as interim relief." *Id.*

[8] Plaintiffs characterize defendants' having acceded to plaintiffs' demands as an "abdication [by defendants] of their position that plaintiffs were not entitled to the maximum number of electable black majority

Nevertheless, and though it is in the court's opinion a close question, the court will conclude that plaintiffs were the prevailing party since it is likely the case that plaintiffs, and this lawsuit, played a motivating role in shaping the particular apportionment plans which the legislature adopted. Plaintiffs are, therefore, entitled to an award of attorneys' fees and expenses and it devolves upon this court to determine an appropriate compensatory award.

PLAINTIFFS, REQUEST

In arriving at an appropriate fee, the court's first task is to ascertain the number of hours reasonably expended on the litigation, following which the court must determine a reasonable hourly rate for each of plaintiffs' attorneys. By multiplying these two figures, this court arrives at the "lodestar," an amount which "normally provides 'reasonable' attorney's fees within the meaning of" the fee-shifting statutes at issue. *Blum v. Stenson.* 465 U.S. 886, 897, 104 S. Ct.

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districts." It does not follow, however, from the mere fact that defendants ultimately succumbed to plaintiffs' demands that defendants conceded plaintiffs' *entitlement* to the relief plaintiffs requested.

1541, 1548, 79 L.Ed.2d 891 (1984). The following represents the fee requests of the various attorneys who represented plaintiffs in this litigation:

Attorney	No. of Hours	Hourly Rate	Total
Carroll Rhodes	1694.75 hrs.	$160.00	$271,160.00[9]
Deborah McDonald	441.68 hrs.	135.00	59,626.80
John L. Walker	108.70 hrs.	160.00	17,392.00
Wilber O. Colom	146.47 hrs.	125.00	18,308.75
Mike Sayer	229.50 hrs.	95.00	21,802.50
Johnny Parker	99.50 hrs.	135.00	13,432.50
Tommie Green	8.20 hrs.	135.00	1,107.00
LODESTAR			$ 402,929.55

Plaintiffs seek a one hundred percent contingency enhancement of the lodestar for total attorneys' fees of $805,659.10. Additionally, plaintiffs request costs and out-of-pocket expenses in the amount of $ 61,279.29 as follows:

Attorney	Totals
Carroll Rhodes	$53,874.91
Deborah McDonald	2,758.90
John L. Walker	2,704.48
Wilbur Colom	1,933.00
Total	$ 61,279.29

[9] Mr. Rhodes states that he seeks compensation for 1664.75 hours. The time included in Mr. Rhodes, records, however, reveals a total of 1694.75 hours, for all of which he presumably seeks to be paid.

Thus, plaintiffs seek an award of fees and expenses in the total amount of $866,938.39. After reviewing the memoranda submitted by the parties in connection with plaintiffs' motion, together with the documentary submissions both in support of and in opposition to plaintiffs' request, including a thorough review and analysis of plaintiffs' attorneys' time submissions, the court concludes that plaintiffs are entitled to an award of fees and expenses in the amount of $198,688.23. While this amount is obviously substantially less than that sought by plaintiffs, it is, in the court's view, a reasonable award of attorneys' fees and expenses for plaintiffs' attorneys' work in this case.

ATTORNEYS' FEES

The court must review attorney time records and affidavits to determine the number of hours reasonably expended "with an eye toward disallowing those hours which are excessive, unnecessary, duplicative or insufficiently documented." *Beamon v. City of Ridgeland*, 666 F. Supp. 937,

941 (S.D. Miss. 1987) (*citing* ***Sims v. Jefferson Downs Racing Ass,n***. 778 F.2d 1068, 1084 (5th Cir. 1983)). As indicated above, attorney Carroll Rhodes seeks compensation for 1694.75 hours for his services in this case. A careful analysis of his time submissions reveals that many of those hours were expended in services which are not properly compensable and/or which were excessive in view of the task being performed. The court recognizes that much of Mr. Rhodes' time prior to the commencement of litigation for which compensation is sought was expended on functions legitimately and reasonably related to the advancement of the litigation as, for example, time spent gathering information, defining plaintiffs' criteria and drafting proposed apportionment plans. However, prior to the filing of the lawsuit, Mr. Rhodes spent 257.75 hours on lobbying-related activities and in connection with the Justice Department's Section 5 review of Mississippi's legislative submission. The court is of the opinion that this time is not properly compensable. The fee-shifting stat-

utes which authorize an award of attorneys' fees are concerned with attorneys' fees in connection with an "action or proceeding to enforce" the subject rights. Where an attorney's work is "both useful and of a type ordinarily necessary to advance the civil rights [and/or Voting Rights Act] litigation," *Webb v. Board of Education of Dyer County*, 471 U.S. 234, 243, 105 S. Ct. 1923, 1929, 85 L.Ed.2d 233 (1985), legal fees for the time expended on that work are recoverable, even though that time is not necessarily directly spent on the litigation. Here, however, plaintiffs' attorneys' legislative lobbying work and their work relating to the Justice Department's review of the State's Section 5 submission were not "necessary" to advance the litigation. *See City of Lerov v. Houston*, 831 F.2d 576, 582-83 (5th Cir. 1987), *cert. denied.*, 486 U.S. 1008, 108 S. Ct. 1735, 100 L.Ed.2d 199 (1988); *Arriola v. Harville*, 781 F.2d 506, 511 (5th Cir.), *cert. denied*, 479 U.S. 820, 107 S. Ct. 84, 93 L.Ed.2d 38 (1986). Indeed, as Mr. Rhodes' time records indicate, as late as June 22, 1991, after months of lobbying

and working with the legislature and after participating in the Section 5 review, and only one week prior to actually filing the complaint in this cause, plaintiffs had not made the final determination to institute litigation.[10] The time so requested will be disallowed.

Even after the court's dissallowance of Mr. Rhodes' time spent in connection with lobbying and Section 5 preclearance work, there remain 173.75 pre-litigation hours for which Mr. Rhodes seeks compensation. The court is of the opinion that this is an excessive amount of time for the performance of the tasks reasonably necessary to the commencement of this action. Accordingly, the court will reduce by fifty percent the number of prelitigation hours for which compensation will be awarded.

Mr. Rhodes' time submissions further reflect 230 hours of "travel time," yet there is no indication to or

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[10] An entry in Mr. Rhodes' time submissions on that date reflects a conference, the subject of which was "strategy on filing lawsuit and whether to file."

from where Mr. Rhodes was travelling during this time.[11] These hours will be disallowed. The court will also disallow 4 hours expended by Mr. Rhodes in press conferences. There is simply no basis for causing compensation for such press conferences to be borne by defendants.

It has been consistently recognized that the losing litigant should neither expect nor be required to pay an attorney's rate for services which are clerical in nature and could be performed by non-lawyers. *See e.g.*, ***Beamon***, 666 F.

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[11] The only entry in Mr. Rhodes' submission which reflects his travel destination is a six-hour travel time entry which indicates that this pre-litigation travel was to Greenville, Mississippi for the purpose of attending a public hearing relating to the legislature's redistricting efforts. As Mr. Rhodes' time in connection with that hearing has been disallowed by the court, then certainly his travel to that hearing would not be compensable. The remaining 224 hours of travel time is derived from 112 separate entries of two-hour travel time each. Many of those entries were, like the six-hour travel time entry, expended in relation to activities which are not compensable in any event. However, not even one of these 112 entries reflects to or from where Mr. Rhodes was traveling. The court initially deduced that Mr. Rhodes was seeking to recover for his time spent in travel from his law office in Hazelhurst, Mississippi to Jackson, Mississippi. However, in a supplemental affidavit provided by Mr. Rhodes in response to defendants' opposition to plaintiffs' motion, Mr. Rhodes states, "I did not include in my itemized bill for services rendered in the above captioned case any time I spent commuting to and from my office." The court, it seems, was incorrect in its deduction, and is thus at a complete loss to divine where or why Mr. Rhodes was traveling during these 224 hours.

Supp. at 941. As his time records demonstrate, Mr. Rhodes expended at least 23.5 hours performing tasks which could easily have been accomplished by clerical personnel, such as computing population deviations, color coding precinct maps and filing court documents. These hours will be compensated, but at the hourly rate of $40, a rate which the court considers to be reasonable for such clerical services.

An additional 67.5 hours will be deducted from the time claimed by Mr. Rhodes as his time records reflect substantially duplicative entries from August 5, 1991 through August 15, 1991. Page 62 of his submission includes 67.5 hours claimed to have been expended during those dates while pages 63 and 64 reveal an additional 81.75 hours spent on virtually those same tasks during those dates. This is obviously an error by Mr. Rhodes as he could not possibly have worked the number of hours claimed.[12]

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[12] While Mr. Rhodes does claim to have worked on this case close to 24 hours a day on a number of occasions during this litigation, it would have been impossible for him to have worked the number of hours reflected on his time sheets for this period of time during August 1991 as demonstrated by the following.

In addition to the foregoing, a comprehensive review of all plaintiffs' attorneys' time submissions reveals in two areas duplication of effort and/or excessive number of hours for which compensation is sought. More specifically, six of plaintiffs' attorneys spent, collectively, 78.3 hours in their efforts relating to the Joint Committee defendants-intervenors' motion to intervene and attempting to set aside the court's order allowing intervention.[13] And, five of plaintiffs' attorneys expended 272.5 hours[14] in efforts in attempting to

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Date	No. of Hours Claimed
8/6/91	28 hours
8/8/91	34 hours
8/9/91	31 hours
8/12/91	34 hours

[13] These attorneys' time sheets demonstrate the following time was spent by each in relation to this matter:

Rhodes	20.0 hours
Sayer	12.0 hours
Parker	23.0 hours
Green	8.0 hours
Walker	5.2 hours
McDonald	10.1 hours

[14] These hours are as follows:

Rhodes	177.5 hours
Sayer	15.0 hours
Parker	9.5 hours
Colom	6.0 hours
McDonald	64.5 hours

secure relief from this court's order of August 9, 1991.[15] Not only were plaintiffs unsuccessful in their efforts to prevent intervention and to secure a stay of this court's orders, or any substantive relief for that matter, but the time they spent in connection with these matters was, in the court's view, if not substantially duplicative, certainly grossly excessive in light of the nature of their tasks. For that reason, the court concludes that the number of hours of each attorney for time spent on these matters should be reduced by fifty percent.

As was the case with Mr. Rhodes, Deborah McDonald's time records reveal that she seeks compensation for a number of prelitigation hours for lobbying and Section 5 review activities. The 26.25 hours so requested will be disallowed by the court. In addition, Ms. McDonald seeks compensation for 5 hours of clerical work, which the court will compensate at the rate of $40 per hour. Thirty hours for

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[15] These figures represent conservative estimates by the court of the time so utilized by plaintiffs' attorneys. In certain instances, it is difficult to determine whether time entries are related to these matters and in cases of doubt, the court has resolved that doubt in plaintiffs' favor.

which McDonald requests an attorney's fee were spent in travel.[16] It has been held that travel time may be compensated at a rate which is less than the reasonable hourly attorneys' fee rate, ***see Martin v. Mabus,*** 734 F. Supp. 1216, 1227 (S.D. Miss. 1990); ***Beamon,*** 666 F. Supp. at 941, and the court will order that compensation for travel time be awarded at one-half of the hourly rate allowed for Ms. McDonald. The court will similarly reduce the hourly fee awarded for Mr. Colom's 29.5 travel hours and Mr. Sayer's 23.5 travel hours by one-half.

Except as noted above, the hours claimed by each of plaintiffs' attorneys will be allowed, and at this stage, the court is called upon to set a "reasonable" hourly rate to be awarded for each of these attorneys' services. It is with regard to the court,s setting of a reasonable hourly rate and plaintiffs' alleged entitlement to an "enhancement" of that rate that plaintiffs seek discovery and an evidentiary hearing.

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[16] She has not in each instance separately denominated such time in her records as "travel time," though it does appear that the time computed by the court was in fact travel time.

Specifically, plaintiffs request that they be granted leave to conduct discovery on: (1) the prevailing market rate for attorney fees in non-contingency complex civil cases and complex contingency civil cases; (2) the necessity of enhancement in civil rights cases; and (3) the market difference between contingency and non-contingency fee cases. The court is of the opinion that such discovery would serve no useful purpose. To the contrary, to permit such discovery would operate only to further delay payment to plaintiffs' attorneys and to needlessly "run up the bill" for their services. The parties have provided a wealth of material in support of their respective positions on plaintiffs' claims for attorneys' fees and to permit discovery on these matters is simply unnecessary. Indeed, the Supreme Court has cautioned that a "request for attorney's fees should not result in a second major litigation." ***Hensley v. Eckerhart***, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). To grant plaintiffs' request would encourage just that result. The request for

discovery will be denied.[17]

In support of their claims for hourly rates ranging from $95 to $160, paintiffs have submitted affidavits of a number of attorneys to demonstrate the prevailing hourly rates charged by attorneys in the Jackson area. The affidavits of these attorneys reflect hourly rates of $150 to $200 for attorneys with over ten years' experience, and of $100 to $150 for those with four to ten years' experience.[18] In

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[17] As indicated *infra* at 19-21, discovery relating to the necessity of a "contingency enhancement" would be to no avail, since recent Supreme Court precedent establishes that such an enhancement is not available in any event.

[18] David Watkins of the Jackson, Mississippi law firm, Brunini, Grahtham, Grower & Hewes, states that the market rate for attorneys in the Jackson area with 10 to 14 years of legal experience who handle complex non-contingency civil cases is $150 per hour. Alveno N. Castilla of the Watkins, Ludlam & Stennis law firm states that the market rates for attorneys with 10 to 14 years' legal experience who handle complex non-contingency civil cases are $165 to $175 per hour, and the rates for those with 5 to 10 years' experience range from $125 to $150 per hour. In 1989, A. Spencer Gilbert, with the law firm, Wise, Carter, Child & Caraway, provided an affidavit in another Mississippi Voting Rights Act case, *Martin v. Mabus.* in which he opined that lawyers with over 10 years' experience and with expertise in their field would normally charge $150 per hour, but that the rate could be as high as $200 per hour. Attorneys with 8 to 10 years' experience and with expertise in their field would charge between $125 and $145 per hour, and those with 4 to 7 years' experience would charge between $100 and $120 for their work. In that same case, J. Brad Pigott of Watkins, Ludlam & Stennis stated that the normally charged hourly rate for attorneys with 6 to 10 years' experience is $120, and is $150 for those with over 10 years of experience. Those affidavits have been provided by plaintiffs in this case, as well.

response to plaintiffs' submissions, defendants have provided the affidavit of Alan M. Purdie, Special Assistant Attorney General of the State of Mississippi, who states that the usual current hourly rate paid by the State for legal services to private in-state counsel is $90. Defendants have additionally furnished affidavits from attorneys which reflect an hourly rate of $100 being charged in civil rights litigation by one Jackson attorney with eight years' experience and expertise in the field, and by another with over fifteen years' experience and expertise in the field.[19] Finally, defendants have advised that the hourly rate that is being charged the State by counsel for the Joint Committee defendants-intervenors in the case *sub judice* by its experienced attorneys is $95. The court has considered all of this evidence in arriving

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[19] Dennis Horn, an attorney with over 15 years' experience, submitted in a 1991 school desegregation case, *Wallace v. The Natchez-Adams School District*, No. W89-0134(B) (S.D. Miss), an affidavit for attorney's fees in which he requested compensation at the rate of "$100 per hour, the market rate." In 1992, Matthew Moore, an attorney with 8 years experience, requested $100 an hour for his work in a § 1983 case involving First Amendment issues, *Lakeland Lounge of Jackson, Inc. v. City of Jackson*. No. J92-0123(B)(C) (S.D.Miss. 1992).

at its conclusion that the following represent "reasonable" hourly rates for each of plaintiffs' attorneys:

Attorney	Rate
Carroll Rhodes	$110.00
John Walker	110.00
Deborah McDonald	95.00
Michael Sayer	95.00
Wilbur Colom	95.00
Johnny Parker	95.00
Tommie Green	95.00

In arriving at these figures, the court has considered the evidence submitted by the parties relating to the local rates of attorneys, and has taken into account the experience and expertise of each attorney, the nature and complexity of the case, including the level of skill and expertise required by the case, and the demands imposed on the attorneys by the case.[20]

[20] Evidence submitted by *plaintiffs* in opposition to defendants' response to their motion confirms, in the court's opinion, that the hourly rates at which the court has arrived for plainpiffs' attorneys' services are reasonable. The exhibits plaintiffs have furnished show the following. As of June 1991, John Price of the law firm, Thomas, Price, Alston, Jones & Davis, charged the state at the rate of $125 per hour. The time of Barry Zirulnik and Cynthia Sarthou of that firm was charged at the rates of $100 and $80, respectively. The firm of Bennett, Lotterhos, Sulser & Wilson, P.A. billed the State at the rate of $100 per hour in 1991. And for services rendered for the State in a Voting Rights Act case relating to judicial redistricting, the Washington, D. C. law firm of Dickstein, Shapiro & Morin, during 1988 charged the State hourly rates ranging from a low of at least $70 to a high of $125.

Plaintiffs assert that "[i]n contingency fee cases, such as this, the lodestar (which is the reasonable hourly rate multiplied by the reasonable number of hours) is enhanced 100-300% to compensate for the risk of not succeeding, the delay in payment, exceptional results, undesirability of the case, preclusion of other employment, etc." Plaintiffs urge that each of these factors is present in the case at bar, and they are therefore entitled to a "market rate contingency enhancement" of one hundred percent. The court must conclude otherwise. Most of the factors cited by plaintiffs are not "enhancement" factors at all, but rather are factors that are taken into account in determining the reasonableness of the hours expended and the attorneys' hourly rates. ***See Hensley.*** 461 U.S. at 434 n.9, 103 S. Ct. at 1940 n.9; ***Johnson v. Georgia Highway Express. Inc.,*** 488 F.2d 714, 717-19 (5th Cir. 1974). That is, they are considerations in *setting* the lodestar, not in *enhancing* the lodestar. Further, though it was until recently widely accepted that the risk of non-compensation could

provide a basis for applying a multiplier or enhancement to the lodestar, the Supreme Court has now explicitly rejected that view, holding that "enhancement for contingency is not permitted under ... fee-shifting statutes" such as that at issue here. ***Citv of Burlington v. Dague,*** _ U.S. _, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992).[21] Plaintiffs respond to ***Dague's*** clear preclusion of a contingency enhancement by arguing that they are not seeking an enhancement of the "lodestar," but rather are seeking an enhancement of their hourly rates, a result which they contend is consistent with *Dague*. In *Dague*. the Court explained:

> [A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those

[21] Though the issue in *Dague* was whether, under the fee-shifting provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), or the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(d), a court may enhance a fee award to an amount above the lodestar to reflect the risk of non-payment, the court recognized that the language of the statutes under consideration was similar to that of many other federal fee-shifting statutes, including Section 1988, and noted that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *Dague*, 112 S. Ct. at 2641.

> merits. The second factor, however, is ordinarily reflected in the lodestar--either in the higher numbers of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. ***Blum, supra***. Taking account of it again through lodestar enhancement amounts to double-counting. *Delaware Valley II.* 483 U.S., at 727-727 (plurality opinion).

112 S. Ct. at 2641. Plaintiffs suggest that even though the Supreme Court rejected the notion of enhancing a lodestar based on the contingency factor, this passage reflects the Supreme Court's approval of awarding an enhanced hourly rate in contingency cases in arriving at the lodestar. This court believes plaintiffs have misconstrued the point of the passage. The Supreme Court, in this court's view, merely observed that some contingency cases by their nature may require the services of attorneys with greater skill and experience who, by reason of that skill and experience, may command higher hourly rates than less skilled or experienced attorneys. That is, it is not the "contingent" nature of the case, *per se.* which determines the allowable rate, but rather

the skill and experience of the attorney performing the services. In the case at bar, the court has taken into account each of plaintiffs' attorney's skill and experience in arriving at a reasonable hourly rate for his/her services. Plaintiffs' request for a contingency enhancement will be denied.

Plaintiffs suggest that another basis for awarding an enhanced fee is the exceptional level of success they attained. The court cannot conclude that such an enhancement would be appropriate in this case. While the court is persuaded that plaintiffs' efforts contributed to the legislature's redistricting plans for the State, and attained their goal of establishing the maximum number of majority black districts, the court attributes plaintiffs' success to the time expended toward achieving their goal, and has accounted for their success in the computation of hours for which they will receive compensation.[22]

Based on the foregoing, the court finds that

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[22] Moreover, it is again worth noting that plaintiffs' level of success in their efforts before the court was quite low.

plantiffs' attorneys are entitled to attorneys' fees computed as follows:

Attorney	No. Hours	Rate	Total
Carroll Rhodes	926.23	$110.00	$101,885.30
	23.50	40.00	940.00
John L. Walker	106.10	110.00	11,671.00
Michael Sayer	192.50	95.00	18,287.50
	23.00	47.50	1,092.50
Johnny Parker	83.25	95.00	7,908.75
Tomie Green	4.20	95.00	399.00
Wilbur Colom	111.62	95.00	10,603.90
	29.50	47.50	1,401.25
Deborah McDonald	344.13	95.00	32,692.35
	30.00	47.50	1,425.00
	5.00	40.00	200.00
	TOTAL		188,506.55

The court now addresses plaintiffs' claim for costs and expenses.

EXPENSES

Plaintiffs' attorneys seek an award of costs and reimbursement of out-of-pocket expenses as follows:

Carroll Rhodes

Filing Fee	$ 120.00
Photocopying	7,586.55
Telecopier	600.00

Business Lunches	732.22
Transportation	
Air Fare	
6/10/91	714.00
8/09/91	828.00
Mileage	
7320 miles @ 22/mile	1,610.40
Taxi	18.00
Brief Printing Costs	
8/91	7,680.65
10/91	244.86
Lodging	104.73
Parking	35.50
Expert Witness Fees	
Sen. Henry Kirksey	6,000.00
Dr. Alan Lichtman	2,200.00
Dr. Richard Engstrom	400.00
Ms. Janaki Hall and Ms. Duana Watkins	25,000.00
Total:	$ 53,874.91

Deborah McDonald

Transportation	
Mileage	2,491.25
Business Lunches	32.65
Photocopying	235.00
Total:	$ 2,758.90

John L. Walker

Photocopying	
MS Supreme Court opinion	1.00

Document Reproduction	1,607.98
Video Tape	14.05
Secretarial Contract Service	125.00
Travel, meals and lodging	30.50
Postage	125.26
Long Distance Telephone charges	238.19
Investigation Fee	30.00
Shipping Fees	309.50
Telecopier	223.00
Total	$ 2.704.48

Wilbur Colom

Photocopying	331.61
Transportation	
Mileage	445.00
Lodging	342.89
Miscellaneous Per Diem	425.00
Telecopier	448.50
Total	1,933.00
TOTAL	$61,279.29

While some of these items are recoverable, many are not.

Plaintiffs are entitled to recover expert witness fees, but only as provided by 28 U.S.C. § 1920 and 28 U.S.C. §

1821.[23] The Supreme Court has held that fee-shifting provisions, such as that applicable here, which restrict the prevailing party's recovery to "attorney's fees," rather than to "attorney's fees and expert witness fees," or "reasonable litigation expenses," must be applied in accordance with their clear terms, such that the term "attorney's fees" cannot be read to include expert fees. *West Virginia Univ. Hosp., Inc. v. Casey*, _ U.S. ___, 111 S. Ct. 1138, 1145-47, 113 L.Ed. 2d 68 (1991). Such statutes, the Court held, "convey[] no authority to shift expert fees." *Id.* at 1148. The only expert fee recoverable is the $40 per day witness fee provided under § 1920 and § 1821. *Id.* In the case at bar, three experts testified on plaintiffs' behalf, Alan Lichtman, Sen. Henry Kirksey and Janika Hall. Plaintiffs are entitled to recover the sum of $120 for those witness fees. The remaining $33,480 of Mr. Rhodes'

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[23] 28 U.S.C. § 1920 includes "[f]ees for ... witnesses" in the listing of recoverable costs. 28 U.S.C. § 1821 provides for the payment of a $40 per day witness fee for each day of the witness' attendance at trial.

request for expert witness fees must be disallowed.[24]

Mr. Rhodes requests the sum of $7,680.65 for the printing of plaintiffs' jurisdictional statement for filing in the Supreme Court and an additional $244.86 for the printing of a brief opposing defendants' motion to dismiss or affirm. These items must also be disallowed, as Rule 50.3 of the Rules of the Supreme Court specifically states that "[t]he expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable." *See Grendel's Den. Inc. v. Larkin.* 749 F.2d 945, 957 (1st Cir. 1984); *Jordan v. Allain.* 619 F. Supp. 98, 116 (N.D. Miss. 1985).

Airfare expenses claimed by Mr. Rhodes in the sum of $1542 appear to be for travel to Washington, D.C. in June 1991 in connection with the Section 5 preclearance

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[24] The Civil Rights Attorneys' Fee Award Act of 1976 was amended last year by the Civil Rights Act of 1991, Pub. L. 102-166 § 113(a), to provide: "In awarding an attorney's fees under subsection (b) of this section in any action or proceeding to enforce a provision of Section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c). Since this lawsuit is not an action or proceeding to enforce 42 U.S.C. § 1981 or § 1981a, this limited authorization of expert fees is inapplicable, even assuming retroactive application.

review and in August 1991 to deliver appeal papers to the Supreme Court. A charge of $104.73 for lodging and of $18 for taxi charges also appear to have been incurred during Mr. Rhodes' June 1991 travel to Washington. In the court's opinion, these expenses should not be allowed. The court has previously determined that Mr. Rhodes' services pertaining to the Section 5 submission are not compensable and thus, travel and lodging expenses relating to that matter would not be recoverable. As for Mr. Rhodes' August 1991 travel, there has been no showing that it was necessary that he personally travel to Washington in connection with the appeal and expenses for that travel will similarly be disallowed.

For the same reason that the court determined that Mr. Rhodes was not entitled to recover attorney's fees for his travel time, the court now concludes that his claim for mileage expenses relating to that travel will not be allowed. In this regard, Mr. Rhodes seeks recovery of mileage expenses in the amount of $1610.40, representing 7320 miles

at a rate of $.22 per mile. As to the vast majority of those miles, 7020, Mr. Rhodes' submissions, as noted *supra*, do not indicate the nature or reason for his travel, nor his point of departure or destination. Thus, $1544.40 of his claim for mileage expenses will not be allowed. However, a supplemental filing by Mr. Rhodes documenting his time and expenses in responding to defendants' reply to the present motion contains more detailed information concerning his travel and mileage expense; the mileage expense included in this supplemental filing, for $66, will be allowed.

Mr. Rhodes requests reimbursement of $732.22 for "business lunches" on forty-four separate dates. With the exception of meals during the trial of this cause, which totalled $79.40, the court is of the opinion that the charging of this item of expense to the defendants would be inappropriate. Accordingly, $ 652.82 of Mr. Rhodes' lunch bill will be disallowed.

While a prevailing party is entitled to recover

expenses for photocopying, those expenses must be reasonable. Mr. Rhodes requests the sum of $7,586.55, as follows:

2/4/91	Copies of Maps	$ 5.00
3/27/91	Copies of Maps	15.00
4/2/91	Copies of Maps	10.00
4/3/91	Copies of Maps	5.00
6/10/91	Newspaper Article	.40
3/91-3/92	Copies of Pleadings,exhibit affidavits, declarations, letters and other correspondence 986 pgs X 20=19,720 pgs X $.25/pg	4,930.00
3/92-6/92	Attorney fee exhibits, affidavits, declarations, motions and correspondence, and copies of pleadings 350 pgs X 15 sets=5,250 pgs X $.25/pg	1,312.50
3/91- 3/92	Copies of plans 979 pgs x 2 = 1,958 pgs.	489.50
10/90-3/92	Copies of cases 684 pages at $.25/pages	171.00
7/27/92-8/28/92	Copies of cases 251 pages at $.25/page	62.75
8/28/92	12 Copies of Reply w/only 8 copies of exhibits, 2,352 pages at $.25/page	588.00

Mr. Rhodes' submission reflects that for the period from March 1991 to March 1992, twenty copies were made of "pleadings, exhibits, affidavits, declarations, letters and other

correspondence." From March 1992 through June 1992, fifteen copies were made of such materials, and by August, twelve copies of these materials were made. The court cannot fathom the necessity of twenty, fifteen, or even twelve copies of each pleading, affidavit, declaration, letter, et cetera. Rather, it seems to the court that no more than nine copies of these materials was necessary.[25] Accordingly, Mr. Rhodes' request for photocopying expenses will be reduced by $3262.00,[26] to the sum of $4324.55.

Attorney Deborah Walker seeks reimbursement for airfare in the amount of $897 in connection with travel to Washington, D.C. during June 1991 for services relating to the State's Section 5 preclearance submission to the Department of Justice. The court finds that this expense should be disallowed for the same reasons that this court determined

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[25] This number would be sufficient to provide copies for each judge on the three-judge panel, each defendant and plaintiffs.

[26] The photocopies of the reply on August 28, 1992 included 12 copies of the brief, which was 34 pages in length. The court has reduced the number of copies of the brief to nine, but has not reduced the number of exhibits.

that Mr. Rhodes' request for his airfare on that occasion was not compensable. Ms. McDonald also seeks to recover $95 in mileage expenses for travel from her office in Fayette, Mississippi to Jackson on various dates from April 13, 1991 to June 11, 1991. Her time submissions reflect that the activities in which Ms. McDonald was involved on each of these trips were related either to lobbying and/or the Section 5 submission and therefore, these mileage expenses are not recoverable. The court is of the opinion that the remainder of Ms. McDonald's expenses are recoverable and will be awarded.

Mr. Walker seeks recovery of expenses in the sum of $2,704.48. Of that amount, the court finds that he is entitled to recover $2,549.48. Secretarial services, for which Mr. Walker has included a charge of $125, are part of an attorney's overhead and thus charges for such services are not recoverable as an item of cost or expense. A further charge by Mr. Walker for a $30 "Investigation fee" will not be allowed by the court; there has been provided no indication

as to the nature or necessity or relationship of any "investigation" to this litigation.

Mr. Colom requests $1,922 in costs and expenses. The court is of the opinion that he may recover $1,508. His submission includes a number of entries on various dates for "miscellaneous per dieum [sic]," totalling $425. While the court will allow Mr. Colom's hotel charges on these dates, the court discerns no basis for granting the recovery of these unspecific, undocumented per diem charges.

Based on the foregoing, costs and expenses will be awarded to plaintiffs' attorneys in the following amounts:

Carroll Rhodes	$ 4,625.45
Deborah McDonald	1,499.25
John L. Walker	2,549.48
Wilbur Colom	1,508.00
TOTAL	10,182.18

Thus, plaintiffs are entitled to a total award of attorneys' fees and expenses in the amount of $198,688.23.

As the State is a defendant, and the additional Joint-Committee defendants were sued in their official capacities,

the plaintiffs' award of fees and expenses shall be paid by the State of Mississippi. *See Martin v. Mabus.* 734 F. Supp. at 1227-28.

CONCLUSION

In conclusion, the court orders the following:

(1) That plaintiffs, motion to dissolve the three-judge court and to remand to the managing judge for a determination of their motion for attorneys' fees and expenses is denied. The three-judge court shall remain convened until such time as plaintiff has formally complied with this court's opinion and order of May 21, 1992;

(2) That plaintiffs shall recover from the State of Mississippi the sum of $198,688.23 representing their attorneys' fees and expenses as set forth herein.

SO ORDERED this 29th day of October, 1992.

/s/ Rhesa H. Barksdale

RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee

TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Charles W. Pickering, Sr.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and **JOHN QUINCY ADAMS,** on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

V. CIVIL ACTION NO. J91-0364(L)

KIRK FORDICE, Governor Of Mississippi, **MIKE MOORE,** Attorney General of the State of Mississippi, and **DICK MOLPUS,** Secretary of State of the State of Mississippi, **MEMBERSOF THE STATE BOARD OF ELECTIONCOMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE,** and **MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE**

Defendants,

STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE;TIM FORD, in His Official Capacity as Speaker of the Mississippi House of Representatives; and **OLLIE MOHAMED,** in His Official Capacity as President Pro Tempore of the Mississippi Senate,

Defendants-Intervenors.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 30 1992
J. T. NOBLIN, CLERK
BY _____ DEPUTY

NOTICE OF APPEAL

Defendants Kirk Fordice, in his official capacity as Governor of the State of Mississippi and as a member of the Mississippi State Board of Election Commissioners, Mike Moore, in his official capacity as Attorney General of the State of Mississippi and as a member of the Mississippi State Board of Election Commissioners, and Dick Molpus, in his official capacity as Secretary of State of the State of Mississippi and as a member of the Mississippi State Board of Election Commissioners and Defendants-Intervenors, the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature; Tim Ford, in his official capac-

ity as Speaker of the Mississippi House of Representatives; and Ollie Mohamed, in his official capacity as President Pro Tempore of the Mississippi Senate, pursuant to 28 U.S.C. §§ 1253, 2101 & 2284 and 42 U.S.C. § 1973c, hereby appeal to the Supreme Court of the United States from the three-judge district court's Memorandum Opinion and Order entered on October 29, 1992.

This, the 30th day of November, 1992.

Respectfully submitted,
KIRK FORDICE, Governor of the State of Mississippi, MIKE MOORE, Attorney General of the State of Mis sissippi, and DICK MOLPUS, Secre tary of State of the State of Mississippi, in their respective official capacities and as members of the State Board of Election Commissioners, State Defen dants

By: MIKE MOORE,
ATTORNEY GENERAL
STATE OF MISSISSIPPI

/s/ Giles W. Bryant

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[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.
Individually and on behalf of
A11 Others Similarly Situated

PLAINTIFFS

V. CIVIL ACTION NO. J91-0364(L)

KIRK FORDICE, Governor of Mississippi,
ET AL.

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, In His Official Capacity As Speaker of the Mississippi House of Representatives; and
OLLIE MOHAMED, In His Official Capacity As President Pro Tempore of The Mississippi Senate

DEFENDANTS-INTERVENORS

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 28 1992
J. T. NOBLIN, CLERK
BY _____ DEPUTY

ORDER WITHDRAWING STATE DEFENDANTS' MOTION TO ESTABLISH SCHEDULE TO ENFORCE COURT OPINION AND ORDER OF AUGUST 9, 1991

This matter is before this Court on Motion of the State Defendants to Withdraw Their Motion to Establish Schedule to Enforce Court Opinion and Order of August 9, 1991, because this Court's Opinion and Order of May 21, 1992, mooted the motion.

IT IS ORDERED:

(1) That the State Defendants' Motion to Withdraw Their Motion to Establish Schedule to Enforce Court Opinion and Order of August 9, 1991, is sustained; and,

(2) That the State Defendants' Motion to Establish Schedule to Enforce Court Opinion and Order of August 9, 1991, is hereby withdrawn.

SO ORDERED, this the 28th day of May, 1992.

/s/ Rhesa H. Barksdale

RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee

TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Charles W. Pickering, Sr.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

NO. 92-1295

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KIRK FORDICE, ET AL.,
APPELLANTS

V.

HOLLIS WATKINS, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

---

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over appellants' direct appeal of an order only awarding attorney fees entered by a three-judge district court ancillary to resolution of the case on the merits?

2. Whether this Court should decided a question that was not raised, litigated, or resolved in the lower court?

3. Whether this Court should grant a petition for writ of certiorari to the Court of Appeals prior to judgment on an issue that is not of imperative public importance concerning the reasonableness of the amount of attorneys' fees awarded by a district court?

4. Should this Court summarily affirm the district court's finding that appellees were prevailing parties when that finding is not clearly erroneous?

TABLE OF CONTENTS

PAGE

Questions Presented for Review..... i

Table of Contents..... ii

Table of Authorities..... iii-iv

Statement of the Case..... 2-4

Argument..... 5-9

1. This Court lacks jurisdiction over appellants' direct appeal of an order only awarding attorney fees entered by a three-judge district court..... 5-6

2. This Court should not decided a question that was not raised litigated, or resolved in the lower court..... 6-7

3. This Court should not grant appellants' petition for writ of certiorari to the Court of Appeals prior to judgement on an issue that is not of imperative public importance concerning the reasonableness of the amount of attorneys' fees awarded by a district court..... 7

4. This Court should summarily affirm the district court's finding that appellees were prevailing parties when that finding is not clearly erroneous..... 8-9

CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES	PAGE
Allen v. State Board of Elections, 393 U. S. 544 (1969)	5
Anderson v. City of Bessemer City, N. C., 470 U. S. 564 (1985)	9
Braxton v. United States, ____ U. S. ____, 111 S. Ct. 1854 (1991)	7
Farrar v. Hobby, ____ U. S. ____, *113 S. Ct.* 566 (1992)	8
Georgia v. United States, 411 U. S. 526 (1973)	7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271 (1949)	9
Hanrahan v. Hampton, 466 U. S. 754, rehearing den 448 U. S. 913 (1980) (per curiam)	9
Hicks v. Pleasure House, 404 U. S. 1 (1971)	5
Maher v. Gagne, 488 U. S. 122 (1980)	9
Mitchell v. Donovan, 398 U. S. 427 (1970)	5
NLRB v. Pittsburg S. S. Co., 486 U. S. 94, rehearing den. 487 U. S. 1243 (1988)	7
Patrick v. Burget, 486 U. S. 94, rehearing den. 487 U. S. 1243 (1988)	6

Supreme Court of Virginia v. Consumers Union,
446 U. S. 719 (1980) 5, 6

Texas Teachers v. Garland School Dist.,
489 U. S. 782 (1989) 8

Watkins v. Fordice,
791 F. Supp. 646
(S. D. Miss. 1992) (three-judge court) 4

Youakim v. Miller,
425 U. S. 231 (1976) 6

Other Authorities:

28 U.S.C. Section 2101(a) 6

28 U.S.C. Section 2101(b) 6

42 U.S.C. Section 1973c 5

SUP. CT. R. 10 7

SUP CT. R. 18.6 1

No. 92-125

In The

SUPREME COURT of the UNITED STATES

October Term, 1992

KIRK FORDICE, ET AL.,

APPELLANTS

V.

HOLLIS WATKINS, ET AL.,

APPELLEES

On Appeal from the United States District Court
For the Southern District of Mississippi

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appelees, pursuant to **SUP CT. R. 18.6,** move to dismiss this appeal, or alternatively, to affirm the district court's holding that appellees were prevailing parties on the grounds that: (1) this Court lacks jurisdiction over appellants' direct appeal; (2) the appeal presents an issue that was not presented nor considered by the court below; (3) the questions presented on appeal are so insubstantial as not to need further argument; and (4) the district court's finding that appellees were prevailing parties was not clearly erroneous.

STATEMENT OF THE CASE

Appellant, the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature (hereinafter referred to as "the Joint Committee"), began the process of reapportioning the Mississippi Legislature in November, 1990 when it held public hearings on reapportionment criteria in Greenville, Mississippi. (R. 2705, 2709, 2710).[1] Appellees, and their attorneys, in Greenville and throughout the process, urged the Joint Committee and the Legislature to adopt, as criteria, (1) equality of population among districts, (2) non-dilution of black voting strength, and (3) creation of the maximum number of electable black majority districts.[2] (R. 2702-2703, 2709, 3266-3292). The Joint Committee adopted but did not follow the suggested criteria in drawing reapportionment plans. (R. 26-29, 2305-2307). Appellees opposed the plans adopted by the Legislature in 1991 because those plans did not create black majority districts wherever possible as did alternate plans presented by appellees. (R. 3267-3289). Opposition by the appellees included submitting a comprehensive written comment, with exhibits, to the United States Attorney General on June 11, 1991 urging the Attorney General to interpose a timely objection to the submitted plans and meeting with Assistant Attorney General John Dunne to voice opposition to the plans. (R. 3293-3355, 2655, 2728). Much of the information provided the Attorney General by appellees formed the basis of the Attorney General's objection to the plans on July 2, 1991. (R. 3293-3355, 26-29).

Partisan primary elections were scheduled for September, 1991, with a candidate qualification deadline of July 19, 1991. (R. 10). The United States Attorney General had not made a determination on appellants'

[1]"R" denotes reference to the record in the trial court followed by the page number.

[2]Appellees defined "electable black majority districts" as those districts containing a black voting age population of 60% throughout most of the State and 65% in the Mississippi Delta. (R. 3299A, n. 8).

submitted plans by June 28, 1991, thus appellees filed suit. (R. 1-29). Appellees asserted four (4) distinct yet interrelated claims: (1) that the present legislative apportionment scheme was unconstitutionally malapportioned; (2) the submitted apportionment scheme was unenforcable because it had not been precleared; (3) the existing apportionment scheme impermissibly diluted black voting strength; and (4) the existing scheme had been gerrymandered for a racially discriminatory purpose. (R. 10-12). As relief, appellees sought: (1) declaratory and injunctive relief against use of the existing malapportioned "or any unprecleared" scheme: (2) "rescheduling" of the candidate qualification deadline and a "court ordered or court approved interim apportionment plan for election districts for the Mississippi State Senate and the Mississippi House of Representatives to be used for the elections scheduled for September 17, 1991 and November 5, 1991" with the persons so elected to hold office "for four years or a shorter time;" (3) an order requiring the appellants "to present legislatively enacted and precleared final reapportionment plans for the Legislature to be used in all legislative elections after preclearance was obtained;" and (4) convening of a three-judge district court to decide the constitutionality of the state legislative apportionment scheme and issues raised by appellees under Section 5 of the Voting Rights Act of 1965. (R. 12-15).

After much litigation and negotiation, the parties settled their differences when the Legislature enacted and obtained preclearance of an apportionment scheme that had been drafted primarily by appellees.[3] (R. 2672-

[3]In support of their motion for an award of attorney fees, appellees' counsel filed declarations, with exhibits attached, which stated that they had negotiated "a settlement." (R. 2630, 2633, 2672-2682, 2722A). As one exhibit clearly shows, "Republican Sen. Roger Wicker of Tupelo, the chairman of the Senate Elections Committee, revealed that at the behest of Lt. Gov. Eddie Briggs, he had met with the attorney for the black [appellees] and essentially let him write his own ticket on how black majority districts would be constructed." (R. 2722A). The evidence further showed that, "Wicker openly admitted the deal was cut to get a commitment from the black [appellees] that the reapportionment plan would not be contested in court." (R. 2822A).

2682, 2722A).

Once the parties reached an accord on the plans, the district court, pursuant to earlier motions and arguments of counsel,[4] scheduled elections under the precleared plans. Appellees timely filed their attorney fees motion setting forth facts which proved the goal of their lawsuit had been achieved through settlement. (R. 2603-2833). Appellants did not file any evidence disputing appellees contentions. More importantly, appellants did not raise a question or file any evidence supporting their assertions being advanced for the first time on this appeal that they negotiated a settlement with appellees and devised, with appellees assistance, the 1992 apportionment plans to satisfy the "subjective concerns" of the United States Attorney General.[5]

Appellees sought $805,659.10 in fees and $61,279.29 in expenses.

[4]Appellants erroneously assert that the district court "sua sponte" scheduled legislative elections in 1992. Juris. Stat. at 11. However, the district court "considered the arguments of counsel at the status conferences, together with the motions and supporting memoranda submitted since [the court's] August, 1991 opinion and orders" in scheduling elections. **Watkins v. Fordice,** 791 F. Supp. 646, 648 (S.D. Miss. 1992) (three-judge court). Although appellees filed their motion to schedule elections prior to appellants on April 28, 1992, (R. 2291-2302, 2385-2488), appellees unconditionally withdrew their motion on June 12, 1992. (R. 2598-2602).

[5]Appellants argued below that the 1992 apportionment scheme addressed the Attorney General's July 2, 1991 objection letter. The Attorney General's letter provided:

> Under these circumstances, we cannot conclude, as we must under the Act, that the State has sustained its burden of showing that the proposed House and Senate redistricting plans are free of any racially discriminatory purpose. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the proposed redistricting plans for the Mississippi House of Representatives and the Mississippi Senate. (R. 28).

ARGUMENT

I. THE COURT SHOULD DISMISS APPELLANTS' APPEAL

A. On ground that this Court lacks jurisdiction of appellants' direct appeal under 28 U.S.C. Sections 1253, 2101, and 2284, and 42 U.S.C. Section 1973c because the appeal is not one from an order granting or denying a preliminary or permanent injunction or holding an Act of Congress unconstitutional or a legislative reapportionment plan violative of the provisions of Section 5 of the Voting Rights Act of 1965.

This court does not have appellate jurisdiction under 28 U.S.C. Section 1253 to consider a direct appeal from an order entered by a three-judge district court, convened pursuant to 28 U.S.C. Section 2284, which only awards attorney fees. **Supreme Court of Virginia v. Consumers Union,** 446 U.S. 719, 737, n. 16 (1980); **Mitchell v. Donovan,** 398 U.S. 427, 430 (1970); **Hicks v. Pleasure House,** 404 U.S. 1 (1971) (per curiam). Nor does this Court have appellate jurisdiction under 42 U.S. C. Section 1973c to consider a direct appeal involving only an attorney fees order entered by a three-judge district court where Section 5 issues are not involved. See, **42 U.S.C. Section 1973c** ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court"). "Action under this section" means one seeking to enforce the preclearance provisions of Section 5 of the Voting Rights Act of 1965. See, **Allen v. State Board of Elections,** 393 U. S. 544 (1969). The instant appeal is not one involving the preclearance provisions of Section 5 of the Voting Rights Act. Therefore, this Court's appellate jurisdiction under 42 U.S.C. Section 1973c cannot be invoked.

Appellants below did not challenge the constitutionality of 42 U.S.C. Section 1973l(e) or 1988.

Consequently, this Court's appellate jurisdiction under **28 U.S.C. Section 2101(a)** cannot be invoked. And, appellants direct appeal to this Court from an attorney fees order is not "authorized by law." See, **Supreme Court of Virginia v. Consumers Union,** supra. Therefore, this Court's appellate jurisdiction under **28 U.S.C. Section 2101(b)** is not invoked.

B. On grounds that the issue of whether appellants enacted the settlement reapportionment plans "to satisfy the subjective concerns of the Attorney General of the United States under Sections 5 and 2 of the Voting Rights Act" was not presented in nor considered by the court below and is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

Appellants did not present evidence or argument in the court below that the case was settled to satisfy any alleged subjective concerns of the United States Attorney General. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." **Youakim v. Miller,** 425 U.S. 231, 234 (1976). The Court traditionally has declined to address such questions even if presented in a petition for writ of certiorari. **Patrick v. Burget,** 486 U.S. 94, 99 n. 5, rehearing den. 487 U.S. 1243 (1988). "It is only in exceptional cases...that questions not pressed or passed upon below are reviewed." **Youakim v. Miller,** supra, at 234. The instant issue raised by appellants is not an exceptional issue requiring deviation from normal appellate practice. The record is void of any evidence which could support the issue. Although appellants perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit, they have not presented the issue to the Fifth Circuit prior to raising it in this Court. No conflict exists in the courts of appeal concerning the issue. Nor has any court of appeals decided the question in a way which

conflicts with precedent in this Court. See **SUP. CT. R. 10.** Normally certiorari jurisdiction is invoked "to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." **Braxton v. United States,** ____U.S.____, 111 S. Ct. 1854, 1857 (1991). No exception exists necessitating this Court to deviate from normal appellate practice and resolve the issue not raised below.

Additionally, the record evidence does not reflect any "subjective concerns" of the Attorney General. To the contrary, the Attorney General's July 2, 1991 objection letter was based on the appellants' failure to prove the 1991 apportionment plans were absent a racially discriminatory purpose. The Attorney General's objection was not based on "subjective concerns" but rather the requirements of Section 5 of the Voting Rights Act. See, **Georgia v. United States,** 411 U.S. 526 (1973). Consequently, this Court should dismiss appellants' appeal.

C. On grounds that the issue of reasonableness of the attorneys' fee award does not involve a conflict in the Circuit Courts of Appeals or with state courts of last resort and is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

Certiorari is usually granted where principles important to the public, as distinguished from the parties, are involved and where a real conflict of opinion and authority exists in the Courts of Appeals. **NLRB v. Pittsburg S.S. Co.,** 340 U.S. 498 (1951). Appellants have not raised, nor can they, any issue important to the public as distinguished from the parties or any conflict in the Circuit Courts of Appeals in the instant appeal. As such, the appeal should be dismissed and the petition for certiorari prior to judgment in the Court of Appeals should be denied.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY AFFIRM THAT PART OF THE DISTRICT COURT'S ORDER HOLDING THAT APPELLEES WERE PREVAILING PARTIES

In the alternative, if this Court determines that it has jurisdiction over this appeal, then appellees submit that the Court should summarily affirm that part of the district court's order which held that appellees were prevailing parties entitled to an award of attorney fees.[6] Appellees presented evidence substantiating their claim that they prevailed on several significant issues in litigation and achieved exceptional results through settlement. Appellants, with insubstantial proof, opposed appellees' "motion for attorneys' fees and expenses contending that [appellees were] not prevailing parties within the meaning of the applicable attorneys' fee statutes." Juris. Stat. at A6. The district court ruled, "[n]evertheless, and though it is in the court's opinion a close question, the court will conclude that [appellees], and this lawsuit, played a motivating role in shaping the particular apportionment plans which the legislature adopted." Juris. Stat. at A12. As such, the court determined that appellees were prevailing parties entitled to an award of attorneys' fees. Juris. Stat. at A12. "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." **Farrar v. Hobby,** ____U.S.____, 113 S. Ct. 566, 573 (1992). The relief may be obtained through a "settlement." **Id.,** at 573. A party has prevailed when he can "point to a resolution of the dispute which changes the legal relationship between" the parties. **Texas Teachers v. Garland School Dist.,** 489 U.S. 782, 792

[6]Appellees request for affirmance of the prevailing parties determination is not inconsistent with their argument in **Watkins v. Fordice,** Sup. Ct. No. 92-1257 (appeal pending), that the three-judge district court did not have jurisdiction to determine the attorney fees issues. The three-judge district court's determination of the prevailing parties issue was harmless error. Only the managing district judge should have decided that issue. Since he, as part of the three-judge court, made the determination, his ruling on this issue can be affirmed.

(1989). A civil rights plaintiff can prevail, for attorney fees purposes, "without formally obtaining relief." **Hanrahan v. Hampton,** 466 U.S. 754, 757, rehearing den. 448 U.S. 913 (1980) (per curiam). "The fact that [appellees] prevailed through a settlement rather than through litigation does not weaken [their] claim to fees." **Maher v. Gagne,** 448 U. S. 122, 129 (1980). There is no requirement that a party obtain a "judicial determination that the [party's] rights have been violated" in order to be declared a prevailing party. **Id.,** at 129.

Obviously, the district court correctly applied these principles in determining that appellees were prevailing parties "entitled to an award of attorneys' fees and expenses..." Juris. Stat. at A12. Where, as here, the district court's determination on the prevailing party question is "based on its familiarity with the progress of the litigation through the pleadings, discovery, and settlement negotiation stages" it should not be disturbed on appeal. **Id.,** at 130, citing **Graver Tank & Mfg. Co. v. Linde Air Products Co.,** 336 U.S. 271, 275 (1949). This Court, in **Graver Tank & Mfg. Co.,** held that appellate courts should "make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings." **Graver Tank & Mfg. Co. v. Linde Air Products Co.,** supra at 275. As this Court has held, "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." **Anderson v. City of Bessemer City, N. C.,** 470 U.S. 564, 574 (1985). Or, stated differently, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." **Id.,** at 573-574. There was abundant evidence in the record supporting the district court's finding that appellees were prevailing parties. That finding is not clearly erroneous and should not be disturbed here. Thus, this Court should summarily affirm the district court's finding that appellees were prevailing parties.

CONCLUSION

On the basis of the foregoing, this Court should dismiss appellants' appeal and deny their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit prior to judgment, or, alternatively, this Court should summarily affirm the district court's finding that appellees were prevailing parties.

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Respectfully submitted,
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